BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY TODD LUCE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,019,161
FRYE CHEVROLET and	)	
PARKS OF AUGUSTA	)	
Respondents	)	
AND	)	
	)	
WICHITA AUTO DEALERS SELF INSURANCE	)	
FUND and SENTRY INSURANCE COMPANY	)	
Insurance Fund	)	
Insurance Carrier	)	

ORDER

Parks of Augusta and its insurance carrier, Sentry Insurance Company, appealed the December 28, 2004 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

Claimant alleges he is entitled to workers compensation benefits due to working around mold while employed at a car dealership owned by Frye Chevrolet (Frye) and later owned by Parks of Augusta (Parks). The principal issues before Judge Clark were whether claimant was injured or developed an occupational disease from working at the car dealership and, if so, whether Frye or Parks should be responsible for this claim.

Finding "[c]laimant's last exposure was while he was working for Parks Motors,"[1] the Judge held Parks of Augusta and its insurance carrier were responsible for the benefits awarded in this claim.

Parks and its insurance carrier contend Judge Clark erred. They argue claimant failed to prove he sustained accidental injury that arose out of and in the course of

[1] ALJ Order (Dec. 28, 2004).

employment with Parks. In the alternative, they argue the appropriate date of accident would be in either February 2002 or sometime in 2003, when Frye Chevrolet owned the dealership. Finally, they argue claimant was not temporarily and totally disabled for the period that the Judge determined claimant was entitled to receive temporary total disability benefits. Accordingly, Parks and its insurance carrier request the Board to reverse the December 28, 2004 preliminary hearing Order. In the alternative, they ask the Board to find a date of accident that would make Frye responsible for claimant's benefits. And lastly, they request the Board at the very least to deny claimant's request for temporary total disability benefits.

Frye and its insurance fund filed a brief with the Board. They argue the Board does not have jurisdiction at this juncture to review the Judge's finding that claimant "was injured out of and in the course of his employment with the [r]espondent each and every working day through July 31, 2004."[2] They also argue the Board does not have jurisdiction at this stage to review the finding that claimant's "last exposure was while he was working for Parks Motors."[3] In the alternative, they agree with Parks that claimant failed to prove he suffered an occupational injury or disease that arose out of and in the course of his employment. And finally, they argue if claimant does have an occupational disease, his last injurious exposure occurred after Frye transferred the car dealership to Parks and, therefore, Parks should be responsible for any benefits due in this claim.

Claimant did not file a brief with the Board and, therefore, the Board does not have the benefit of his input for this appeal.

The issues on this appeal are:

1. Does the Board have jurisdiction to review preliminary hearing findings to determine the date of accident or date of last injurious exposure when that finding would determine which of two employers would be responsible for the benefits awarded?

2. Did claimant sustain a compensable injury or develop an occupational disease from working at the car dealership owned by Frye and Parks?

3. If so, which respondent is responsible for the benefits in this claim?

The parties did not address to any degree or present any medical evidence whether claimant's alleged exposure should be considered an accidental injury or a disease. And

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[2] ALJ Order (Dec. 28, 2004).

[3] *Id.*

if a disease, whether the exposure would satisfy that of occupational disease as used in the Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidence compiled to date and the parties' arguments, the Board finds and concludes:

Claimant worked as a car salesman for Frye Chevrolet for approximately three years. In early 2004, Parks of Augusta took over the car dealership from Frye. Claimant worked for Parks for approximately 90 days before terminating his employment on the advice of his doctor to stop working in that building. Claimant's last day working for the car dealership was approximately July 31, 2004.

After claimant began working at the car dealership he developed hives and breathing difficulties. Claimant alleges he became ill from being exposed to mold at the car dealership, which was once flooded.

At this juncture of the claim, the Board is not persuaded to modify the Judge's findings. Claimant testified he began experiencing skin problems, allergic-type reactions, and breathing difficulties shortly after he began working at the dealership. Claimant's testimony is uncontradicted that one of his treating physicians, Dr. Ronald M. Varner, attributed his symptoms to the building where claimant worked. In addition, claimant introduced an October 20, 2004 report from Dr. John D. Flesher in which the doctor appears to attribute claimant's problems to a fungal exposure at work. The report reads, in pertinent part:

> **IMPRESSIONS:**
>
> 1. Probable hypersensitivity pneumonitis secondary to fungal exposure at work. This now seems to be improving now that the patient is out of that working environment. He believes that it was a fungus that was contributing to this.
>
> 2. Persistent asthma.
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> 3. Allergic rhinitis.
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> . . . .
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> **MEDICAL HISTORY:** This is a 43-year-old male with a classic history for hypersensitivity pneumonitis. He states that his symptoms started approximately three years ago when he was working for [a] car dealership that had been flooded. There was "black mold" all over the walls. When he was at work, he would have

> severe shortness of breath, wheezing, coughing, and skin rash consistent with urticaria. When he would leave work at times, his rash would develop and then by the next morning, it started to improve until he went to work again. He always stated that when he was away or "out in the country", his symptoms improved. When he was at work, his symptoms worsened. He finally started developing some cough productive of some brownish sputum. He sought multiple physicians[']opinions on this and has really gained no relief as long as he would [be] in that environment. He recently quit working at that job and has began to improve.[4]

For preliminary hearing purposes, claimant has established, by the barest of margins, a link between his work and his present need for medical treatment.

Whether claimant's condition is ultimately determined to be an occupational disease or an accidental injury, claimant's exposure to the harmful agent continued through his last day of work. Accordingly, the Board affirms the Judge's finding that Parks and its insurance carrier are responsible for the preliminary hearing benefits due in this claim.

The Board is mindful that Frye challenged the Board's jurisdiction at this juncture of the claim to determine the date of accident or date of last injurious exposure. The Board concludes it does have the authority and jurisdiction to determine that preliminary hearing issue as the finding dictates which employer is responsible for the benefits due in this claim. On the other hand, the Board does not have jurisdiction in a review of a preliminary hearing order to address the issue of whether a worker meets the definition of being temporarily and totally disabled.[5]

The Board concludes the December 28, 2004 preliminary hearing Order should be affirmed. Nonetheless, preliminary hearing findings are not binding and may be modified in a full hearing of the claim.[6]

WHEREFORE, the Board affirms the December 28, 2004 Order entered by Judge Clark.

IT IS SO ORDERED.

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[4] See P.H. Trans., Cl. Ex. 1.

[5] See K.S.A. 44-534a(a)(2).

[6] *Id.*

Dated this ____ day of March 2005.

BOARD MEMBER

c: Andrew E. Busch, Attorney for Claimant
Kirby A. Vernon, Attorney for Frye and its Insurance Fund
Jeffrey A. Mullins, Attorney for Parks and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director